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October 26, 1995

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OCT 26 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

VIA HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

RE: Amendment of Section 73.202(b)
Table of Allotments FM Broadcast Stations
(Moncks Corner, Kiawah Island, and Sampit, SC

Dear Mr. Caton:

On behalf of the L.M. Communications II of South Carolina, Inc., transmitted herewith is an original and four copies of its Reply Comments in the above-referenced proceeding.

In the event that there are any questions concerning this application, please contact the undersigned.

Sincerely,

Nancy A. Ory
Nancy A. Ory

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BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

RECEIVED
OCT 26 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Amendment of Section 73.202(b)) MM Docket No. 94-70
Table of Allotments)
FM Broadcast Stations)
(Moncks Corner, Kiawah Island,)
and Sampit, South Carolina))

To: Chief, Allocations Branch

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REPLY COMMENTS OF L.M.
COMMUNICATIONS II OF SOUTH CAROLINA, INC.

L.M. Communications II of South Carolina, Inc.
("L.M."), licensee of broadcast Station WJYQ(FM), Moncks Corner,
South Carolina, by its attorneys, hereby replies to the Comments
and Counterproposal of Sampit Broadcasters ("SB") ("SB
Counterproposal") in the above-captioned rule making
proceeding.^{1/}

I. Background

At the request of Ceder Carolina Limited Partnership
("Ceder"), former licensee of Station WJYQ, the Commission
substituted Channel 287C3 for Channel 288A at Moncks Corner and
modified the license of Station WJYQ accordingly. *FM Table of*

^{1/} A Public Notice indicating the filing of the SB
Counterproposal and stating that Reply Comments to the SB
Counterproposal are due no later than 15 days after the date
of the public notice was released by the Commission on
October 11, 1995. FCC Report No. 2104. Therefore, these
Reply Comments are timely filed.

Allotments (Blackville, South Carolina, et al.), MM Docket No. 91-127, 7 FCC Rcd 6522 (Allocations Branch, 1992). The former licensee of Station WJYQ applied for and obtained a construction permit to operate on Channel 287C3 (FCC File No. BMPH-930511IB). Subsequently, the authorizations for Station WJYQ were involuntarily assigned to Orville Ronald Brandon, the court-appointed Receiver for Ceder.

On May 30, 1995, the authorizations for Station WJYQ were assigned from Mr. Brandon, Receiver, to L.M. Station WJYQ was off the air at that time. L.M. filed an application to modify the WJYQ facilities to operate from an improved site, and a construction permit for this modification was granted on July 5, 1995 (FCC File No. BMPH-950522IA). L.M. resumed operations of the station, as modified, on Channel 287C3 on July 28, 1995, and Station WJYQ is currently operating pursuant to program test authority.^{2/}

In the instant proceeding, the Commission has proposed the amendment of Section 73.202(b) of the rules to delete WJYQ's authorized allotment, Channel 287C3, from Moncks Corner, South Carolina, to allot Channel 288C2 to Kiawah Island, as that

^{2/} On August 22, 1995, L.M. Filed an application for license to cover (FCC File No. BLH-950822KC). This application has been accepted for filing, Public Notice, FCC Report No. 23585 (released, September 5, 1995), and is currently pending.

community's first local transmission service, and to modify the construction permit of Station WJYQ accordingly. Mr. Brandon, as the licensee of Station WJYQ at the time the Notice of Proposed Rule Making was issued, filed Comments in support of this proposal on August 26, 1994.

The SB Counterproposal sets forth a series of interdependent changes to the FM Table of Allotments: the allocation of Channel 288A to Kiawah Island, the substitution of Channel 287A instead of Channel 287C3 at Moncks Corner, and the allocation of Channel 289A to Sampit, South Carolina. The Commission formally announced the SB Counterproposal for the allocation of Channel 289A to Sampit, South Carolina on October 11, 1995. For the reasons set forth herein, the SB Counterproposal for Channel 289A at Sampit should be rejected by the Commission, and L.M.'s proposal to delete Channel 287C3 from Moncks Corner and to allot Channel 288C2 to Kiawah Island should be granted.^{3/}

^{3/} As licensee of Station WJYQ, a copy of the SB Counterproposal was mailed to Mr. Brandon on August 26, 1994. On September 12, 1994, Mr. Brandon filed Reply Comments and a Motion for Summary Dismissal of the SB Counterproposal. To L.M.'s knowledge, no decision with respect to the Motion for Summary Dismissal has been issued. In light of the Commission's formal announcement of the SB Counterproposal for allocation of Channel 289A to Sampit, South Carolina, FCC Report No. 2104 (released October 11, 1995), L.M. is filing Reply Comments at this time in connection with the Sampit portion of the Counterproposal (continued...)

II. **Sampit, South Carolina Does Not Qualify As A Community For FCC Allocation Purposes**

As a threshold matter, the Commission should dismiss the SB Counterproposal because Sampit is not a sufficiently sizable, distinct place to justify allotment of Channel 289A in lieu of allotting Channel 288C2 at Kiawah Island, as that community's first local transmission service. Under the Commission's long standing policy, radio broadcast channels may only be allotted to communities composed of geographically identifiable population groupings. *Amendment of Section 73.202(b) (Trade, Tennessee and Beech Mountain, North Carolina)*, 6 FCC Rcd 5835, 5836 (Allocations Branch, 1991). Sampit, South Carolina is clearly not such a community. Mere geographic location is not sufficient to establish "community" status. *Amendment of Section 73.202(b) (Hannibal, Ohio)*, 6 FCC Rcd 2144 (Allocations Branch, 1991); *Amendment of Section 73.202(b) (Clark, Colorado)*, 10 FCC Rcd 7635, n.2 (Allocations Branch, 1995). Instead, Commission precedent requires that a proponent of an allotment demonstrate that a community is composed of a

^{3/} (...continued)

only. L.M. infers from the Commission's failure to include SB's proposal to allot Channel 288A to Kiawah Island and to allot Channel 287A to Moncks Corner that the Commission has tentatively granted WJYQ's Motion for Summary Dismissal as to those two allotments. To the extent that this inference is incorrect, L.M. incorporates by reference the arguments set forth in the Motion for Summary Dismissal.

geographically identifiable population grouping by presenting evidence of other indicia of community status such as political, social, or business organizations, or by providing the testimony of local residents. *Hannibal, Ohio*, 6 FCC Rcd 2144. The SB Counterproposal wholly fails to make this requisite showing.

First, Sampit is neither incorporated nor recognized by the U.S. Census as a Census Designated Place. It has no form of local government, no post office and no zip code - residents of the area referred to as "Sampit" have Georgetown, South Carolina addresses and zip codes. All mail sent from the area bears a Georgetown, South Carolina postmark. The SB Counterproposal fails to demonstrate that the residents of Sampit receive any municipal services, such as police or water, from any organization or entity associated with Sampit. Although the SB Counterproposal includes a list of "Businesses and Organizations in Sampit, South Carolina," SB Counterproposal, Technical Exhibit at Attachment 3, an on-site investigation by L.M.'s sole owner, Mr. Lynn M. Martin, revealed that the list is inaccurate and misleading. For example, although the list includes a rural fire department and a water and sewer division, as the list itself indicates, these services are provided by Georgetown County, not Sampit.

Mr. Martin visited the Georgetown area on October 21 in order to observe firsthand the "community" called Sampit. See *Declaration of Lynn M. Martin*, attached hereto. He observed a largely rural area with no mayor or city government, no post office, no police department, and no public library. See *Declaration of Lynn M. Martin* at ¶ 2.

Although Mr. Martin did observe an elementary school named "Sampit Elementary," the address of the school is Route 242, Georgetown, South Carolina. Students residing in the area attend junior high and high school in either Georgetown or Andrews, South Carolina. See *Declaration of Lynn M. Martin* at ¶ 3.

Area residents informed Mr. Martin that Sampit is simply an area of Georgetown, South Carolina, which is referred to as "Sampit" due to its proximity to the Sampit River. See *Declaration of Lynn M. Martin* at ¶ 4.

The SB Counterproposal attempts to show that Sampit is a "community" for FCC allocation purposes by providing information from the Georgetown County Planning Commission ("GCPC") which states that the population of Sampit Community is 2,607 persons, and that "the community has a defined center with a commercial core along US Highway 17-A." *SB Counterproposal, Technical Exhibit* at 4B. The SB Counterproposal lists several

businesses, churches and organizations apparently located in Sampit. *SB Counterproposal, Technical Exhibit at Attachment 3.* The SB Counterproposal, however, provides little indication that the businesses, churches and organizations identify themselves in any manner with the "community" of Sampit. In fact, the businesses, churches and organizations included on Attachment 3 all have Georgetown, South Carolina addresses. In addition, the only "commercial areas" apparent from the map submitted with the SB Counterproposal are the nearby communities of Georgetown and Andrews. *See SB Counterproposal, Technical Exhibit at 4C.*

The complete lack of any political, social, or business organizations or any extensive commercial area in Sampit indicates that Sampit is in fact a rural area contiguous to and dependent upon the larger community of Georgetown. It is abundantly clear that the SB Counterproposal is merely an effort by SB to obtain an allocation to serve the nearby communities of Georgetown, which already has one AM and three FM stations (Stations WGTN(AM), WSCA(FM), WSYN(FM) and WWXM(FM)) or Andrews, which has one local FM station (Station WGTN-FM).

III. Commission Precedent Does Not Require A Detailed Showing Regarding Transmitter Site Availability At The Allotment Stage Of An Upgrade Proceeding

In the SB Counterproposal, SB asserts that Station WJYQ's proposed site is located in a tidal marsh and is in close

proximity to the Charleston Executive Airport where towers are "highly likely to be restricted to an unusable height." SB Counterproposal at 2. SB has failed to provide substantive evidence, as opposed to unsupported allegations from its consulting engineer, to support these assertions. Even if they were true, however, they would not provide any basis for the denial of the upgrade of Station WJYQ as requested.

As demonstrated by the technical exhibit included with the original petition, Station WJYQ's proposed reference site was selected in order to maintain predicted interference-free service to Moncks Corner and to minimize the potential loss area compared to the authorized service from Station WJYQ. Although Station WJYQ recognizes that a portion of the fully-spaced reference site zone may in fact be located in a tidal marsh (as would be expected in any coastal community), the area also includes a substantial area within which a suitable site can readily be located. *See Technical Statement Supporting Reply Comments of Orville Ronald Brandon at 2-3 & Figure 1, attached hereto as Exhibit 1.*

Furthermore, as SB is undoubtedly aware, it is well established that the Commission does not require detailed showings regarding the availability or suitability of a particular site in rule making proceedings to allot FM channels,

beyond the basic requirement that an adequate signal be placed over the community of license from an identifiable site which conforms to the spacing rules. See, e.g., *FM Table of Allotments (Key West, Florida)*, 3 FCC Rcd 6423 (Policy and Rules Division, 1988). Instead, final site selection and a determination of site availability (and, as necessary, suitability) are ascertained at the time an applicant files an application for construction permit.

In cases where a "sufficiently compelling showing" is made that no site exists which complies with the Commission's fundamental technical rules, the Commission may refuse to allot the requested channel. In this case, however, SB has failed to even attempt to make any showing -- much less a "compelling" one -- that there is no site available from which Station WJYQ can operate which complies with the Commission's signal coverage and separation rules. For example, SB has not submitted an aeronautical study or a statement from the Federal Aviation Administration in support of its contention that a site in the proposed reference area would be an air hazard due to the proximity of Charleston Executive Airport. Instead, SB merely speculates that there is no available site for Station WJYQ(FM)'s proposed changes. Accordingly, SB's claims regarding lack of site availability must be disregarded.

IV. Kiawah Island Is Not Located Within The Charleston Urbanized Area

Next, the SB Counterproposal states that "while neither the communities of Kiawah Island nor Moncks Corner are in the Charleston Urbanized Area, the transmitter site selected by Ceder is." SB Counterproposal at 3. Based on this fact alone, SB claims that the upgrade proposal for Station WJYQ must be considered one for Charleston and not for Kiawah Island. SB has provided no support for its claim that the mere fact that a transmitter site is located within an Urbanized Area is to be considered the same as the specification of a new community of license within an Urbanized Area for purposes of evaluating the allocations priorities of a particular proposal.

Both the proposed operation for Station WJYQ on Channel 288C2 from Kiawah Island and its authorized operation on Channel 287C3 at Moncks Corner result in the provision of reception service across a substantial portion of the Charleston Urbanized Area. Yet, the Commission has previously decided that factor is not significant. Both Moncks Corner and Kiawah Island are, as SB acknowledges, located outside of the Charleston Urbanized Area; the Commission has already held that Kiawah Island is entitled to a first local transmission service preference despite its proximity to, but location outside of, the Charleston Urbanized

Area. *FM Table of Allotments (Blackville, South Carolina, et al.)*, 7 FCC Rcd 6522 (Allocations Branch, 1992). SB has failed to provide any evidence or precedent to support its contention. Rather, it simply asserts that the selection of a transmitter site (barely) within the Charleston Urbanized Area, standing alone, fatally taints the proposal as one for Charleston rather than Kiawah Island. Consequently, SB's request for a presumption that Station WJYQ proposes to serve Charleston and not Kiawah Island must be dismissed summarily. Further, the Commission no longer entertains the broad presumption that applicants proposing to operate from a suburb of large cities do not intend to serve the needs and interests of the suburban communities. *Suburban Community Policy, the Berwick Doctrine, and the De Facto Reallocation Policy*, 93 F.C.C. 2d 436, 450-51 (Commission, 1983), *recon. denied*, 56 R.R.2d 835 (Commission, 1984); *Faye & Richard Tuck*, 3 FCC Rcd 5374 (Commission, 1988).

V. **The Current Rule Making Involves New Substantive Factors That Distinguish It From The Basis For The Commission's Previous Decision In MM Docket 91-127**

Finally, SB dismisses the request for an upgrade of Station WJYQ as "a simple 're-hash' of the ... proposal [in MM Docket No. 91-127]." SB Counterproposal, Technical Exhibit at 2. In the Petition for Rule Making filed on behalf of Station WJYQ that resulted in the institution of this proceeding, it was

acknowledged that the Commission had previously denied an upgrade for Station WJYQ to a Class C2 station at Kiawah Island in favor of the currently authorized Class C3 operation at Moncks Corner. It was there explained that the spacing considerations limiting the location of a Class C2 transmitter site for Kiawah Island had changed since the decision in MM Docket No. 91-127, and that the loss of interference-free service across Moncks Corner, which figured so prominently in the Commission's decision in the earlier case, could now be substantially reduced by a station operating within the permissible fully-spaced site zone for Channel 288C2 at Kiawah Island.^{4/} This fact not only distinguishes the current rule making request submitted for Station WJYQ from the circumstances considered in MM Docket No. 91-127, but also provides the basis for the Commission's grant of the current request for the reasons previously set forth.

^{4/} Indeed, the Technical Exhibit submitted with the petition for rule making asserted further that, because of additional flexibility that will be available to Station WJYQ at the application stage, the station will likely be able to provide better than 1.0 mV/m service across all of Moncks Corner.

**VI. The Proposal to Allocate Channel 288C2 to Kiawah Island
Is Superior To The Proposal to Allocate Channel 289A to
Sampit**

As demonstrated above, Sampit is not a sufficiently sizable, distinct place to qualify as a "community" for FCC allotment purposes and is in fact a rural area contiguous to and dependent upon the larger community of Georgetown. As such, SB's proposal to allot Channel 289A to Sampit must be considered a proposal to allot a fourth FM channel to Georgetown, South Carolina.

In comparing competing FM proposals, the Commission weighs the public interest benefits from the proposals in light of its FM allotment priorities. The FM priorities are (1) first aural service, (2) second aural service, (3) first local service, and (4) other public interest matters. Co-equal weight is given to priorities (2) and (3). *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982). In this case, the first two allotment priorities are not implicated, since Kiawah Island and the Sampit area of Georgetown both receive aural service from several FM stations. With respect to priority three, Kiawah Island is the only community which would stand to gain a first local service, since Sampit does not qualify as a community for FCC allotment purposes, and the community of Georgetown, of which Sampit is a part, already has three FM

stations. Therefore, the proposal to allot Channel 288C2 to Kiawah Island is superior to the proposal to allocate Channel 289A to Sampit.

VII. Conclusion

As the Commission observed in the *Notice of Proposed Rule Making*, the changes proposed by Station WJYQ will serve the public interest by providing Kiawah Island with its first local transmission service and will permit a significant increase in service by Station WJYQ. *FM Table of Allotments (Moncks Corner and Kiawah Island, South Carolina), Notice of Proposed Rule Making*, 9 FCC Rcd 3136, ¶ 3 (Allocations Branch, 1994). As shown herein, the SB Counterproposal is deficient in that it proposes to allocate a channel to an area which does not qualify as a community for FCC allocation purposes. Further, none of the objections to the allocation of Channel 288C2 at Kiawah Island in the SB Counterproposal presents any basis on which to reject the proposed upgrade of the station. L.M. therefore urges that the Commission adopt the allocation changes set forth in the *Notice*

of Proposed Rule Making and modify the license and construction permit of Station WJYQ accordingly.

Respectfully submitted,

**L.M. COMMUNICATIONS II OF
SOUTH CAROLINA, INC.**

By: Nancy A. Ory
Steven A. Lerman
Sally A. Buckman
Nancy A. Ory

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Its Attorneys

October 26, 1995

EXHIBIT 1

TECHNICAL STATEMENT
SUPPORTING REPLY COMMENTS OF
ORVILLE RONALD BRANDON
MM DOCKET 94-70

INTRODUCTION

These technical comments and attached exhibit have been prepared on behalf of Orville Ronald Brandon, Receiver (ORB), licensee of station WJYQ(FM) at Moncks Corner, South Carolina.¹ In the FCC's Notice of Proposed Rule Making (NPRM) in MM Docket 94-70, it is proposed to upgrade WJYQ to channel 288C2 (105.5 MHz) and change city of allotment from Moncks Corner, South Carolina to Kiawah Island, South Carolina. This response from ORB is in reply to comments filed in MM Docket 94-70.

ORB filed comments stating his continued interest in the proposed allotment of channel 288C2 to Kiawah Island. Information was provided concerning the number of available radio services in the proposed channel 288C2 gain area. Comments and a counterproposal were filed by another party.²

Sampit Broadcasters (SB) question the validity of ORB's proposed channel 288C2 reference site. SB alleges the channel 288C2 proposed reference site, because of its proximity to the Charleston Urbanized Area, makes

¹ Orville Ronald Brandon is the successor-in-interest to Cedar Carolina Limited Partnership, the original petitioner in MM Docket 94-70.

² Sampit Broadcasters' counterproposal is the subject of a separate response submitted by ORB.

it a request for a Charleston station. SB further suggests a lower class for Kiawah Island instead of the ORB Class C2 proposal. Finally, SB claims the ORB proposal is a substandard allotment.

DISCUSSION

As noted in the WJYQ Petition for Rule Making (PRM), the proposed channel 288C2 reference site was selected to place it close to Moncks Corner in order to maintain predicted 1 mV/m (60 dBu) service to Moncks Corner and minimize the potential loss area. The proposed channel 288C2 reference site was arbitrarily selected to achieve this purpose. This is somewhat similar to the FCC staff selecting a site restricted reference point in close proximity to the requested community.

Exhibit #1 attached to the original petition (Useable Area Map for Channel 288C2) shows a substantial area within which to locate a transmitter site for channel 288C2 in compliance with the FCC's minimum separation requirements. The area for channel 288C2 includes significant portions of James Island and Johns Island. Figure 1 attached shows a portion of the area to locate channel 288C2 on large scale 1/24,000 scale topographic maps. It is believed this map demonstrates a substantial area within which to locate a suitable site for channel

288C2.⁴³ The actual selection of a site, its availability, the ascertainment of reasonable assurance for use, and notification to the FAA is appropriate at the application stage, not the rule making stage.

SB alleges that since the assumed channel 288C2 reference point is located just within the Charleston Urbanized Area, the proposal is for a new Charleston FM station. The communities of allotment are what is pertinent, not the arbitrary locations of reference sites. As noted in the original petition, the present WJYQ city of allotment (Moncks Corner) and the proposed city of allotment (Kiawah Island) are both located outside the Charleston Urbanized Area. SB's comments concur with this.


Throughout its comments, SB contends that the ORB proposal for channel 288C2 is "substandard" and wasteful of FM spectrum. ORB has already provided population information for the proposed channel 288C2 allotment, which reports that channel 288C2 would provide predicted 1 mV/m service to 468,867 people, and a net gain in 1 mV/m service to 250,238 people when compared to the initial Class A allotment at Moncks Corner. Additionally, it is inevitable that any FM service at Kiawah Island will direct some proportion of the signal over water. What is

⁴³ In addition to the area shown on the maps for channel 288C2, there are additional areas which will be available for consideration at application time in accordance with Section 73.215 of the FCC rules. Stations WDAR-FM on channel 288C3 at Darlington, South Carolina and WZNY on channel 289C at Augusta, Georgia are both authorized under Section 73.215. Station WDAR-FM represents the north site restriction for channel 288C2, and WZNY represents the west site restriction.

of significance, however, is the number of people served by the respective proposals. It then suggests a Class A operation on Channel 288 instead of ORB's proposal for a Class C2 operation. The estimated population (1990 Census) within the predicted 1 mV/m contour for a maximum facility operation on channel 288A (6 kW, 100 meters) at SB's proposed reference site is 147,413 people. When compared with ORB's channel 288C2 proposal (468,867 people) the SB proposal is markedly inferior.

I, John A. Lundin, am Vice President of du Treil, Lundin & Rackley, Inc., a consulting communications engineering firm located at 240 North Washington Boulevard, Suite 700, Sarasota, Florida, 34236. I am a registered professional engineer in the District of Columbia (#7499) and the State of Florida (#46454). My qualifications as an engineer are matter of record with the Federal Communications Commission.

The attached technical report has been prepared for Orville Ronald Brandon (ORB). The calculations and exhibits contained in this report were made by me personally or under my direction. All facts contained therein are true of my own knowledge except where stated to be on information or belief, and as to those facts, I believe them to be true.


John A. Lundin

Registered Professional Engineer
DC No. 7499
FL No. 46454

September 9, 1994

DECLARATION OF LYNN M. MARTIN

I, Lynn M. Martin, do hereby declare under penalty of perjury as follows:

1. I am President, Treasurer, Secretary, sole Director and the sole shareholder of L.M. Communications II of South Carolina, Inc.

2. On October 21, 1995, I visited the Georgetown area in order to observe firsthand the "community" called Sampit. While there, I observed a largely rural area with no mayor or other form of government, no post office, no police department, and no public library.

3. The address of "Sampit Elementary" is Route 242, Georgetown, South Carolina. Local residents to whom I spoke informed me that students residing in the area attend junior high and high school in either Georgetown or Andrews, South Carolina.

4. Area residents informed me that an area of Georgetown, South Carolina, which is referred to as "Sampit" due to its proximity to the Sampit River.

5. I have reviewed the foregoing "Reply Comments of L.M. Communications II of South Carolina, Inc." and to the best of my knowledge, the facts set forth in Section II therein are true and correct.


Lynn M. Martin

Date: 10/25/95

Certificate of Service

I, Tamara L. Mariner, certify that a copy of the foregoing "Reply Comments of L.M. Communications of South Carolina, Inc." has been hand-delivered this 26th day of October, 1995 to the following:

Sharon P. McDonald
FCC
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Tamara L. Mariner